UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 5:10-CV-00391-BO

SURJIT SINGH SAUND, an individual,	)	
	)	
Plaintiff,	)	
	)	**REPLY TO PLAINTIFF'S**
v.	)	**OPPOSITION TO DEFENDANT'S**
	)	**MOTION TO DISMISS AND FOR**
M. M. FOWLER, INC. d/b/a FAMILY	)	**PARTIAL SUMMARY JUDGMENT**
FARE CONVENIENCE STORES, a	)	
North Carolina Corporation,	)	
	)	
Defendant.	)	

Defendant M. M. Fowler, Inc. d/b/a Family Fare Convenience Stores ("Fowler") respectfully submits this reply to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion (the "Response"). As an initial matter, Plaintiff's comparison of Fowler's application of its dress code policy to post-September 11, 2001, "racial profiling" by the Transportation Safety Administration or other law enforcement officials and targeted harassment of Sikhs in the form of racial epithets and slurs is wholly gratuitous and inflammatory, and finds no support in the Complaint allegations. Moreover, should this case proceed, the evidence will show that Fowler embraces diversity. Family Fare store operators come from at least 16 different countries, including Pakistan, India, Lebanon, Kuwait, Nigeria, South Africa, Kenya, Bangladesh, Jordan, Tanzania, Peru, Senegal, Chile, Ethiopia, China and the United States. Fowler prominently displays the flags of these countries at its training facility. In addition, at least one Store Operator is an ethnic Sikh who does not wear a turban or unshorn hair and beard. In any event, the issue for the Court on Fowler's motion to dismiss is whether *this* Plaintiff has in *this* case alleged facts sufficient to state a claim for intentional racial discrimination. He has not and his § 1981 claim (along with the state law claims) should be dismissed with prejudice.[1]

[1] Based on new information unknown to Fowler at the time it filed its motion and provided by Plaintiff in his declaration (but which was inexplicably absent from the Complaint, raising serious questions about Plaintiff's credibility), Fowler acknowledges that there is a genuine issue of material fact concerning whether and when

ARGUMENT

I. PLAINTIFF HAS FAILED TO STATE A PLAUSIBLE CLAIM OF INTENTIONAL RACE DISCRIMINATION UNDER § 1981 AND HIS OWN FACTUAL ADMISSIONS CONCLUSIVELY DISPROVE SUCH A CLAIM.

A. Plaintiff's factual allegations do not support a § 1981 claim for intentional racial discrimination.

Plaintiff's factual allegations do not establish a plausible claim under 42 U.S.C. § 1981. Plaintiff has alleged discrimination on the basis of his religion, Sikhism, and his race, Sikh. Compl. ¶¶ 40, 41.[2] While race and religion are closely linked in certain instances, they remain distinct legal categories. *See, e.g.*, 42 U.S.C. § 2000e-2 (describing "race" and "religion" as distinct protected classes under Title VII); *Runyon v. McCrary*, 427 U.S. 160, 167-68 (stating that § 1981 "prohibits racial discrimination" but "is in no way addressed to" religious discrimination). To prevail under § 1981, Plaintiff must show that Fowler intentionally discriminated against him "because of his race," *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 345 (4th Cir. 2006), *cert. denied*, 549 U.S. 1362 (2007) (emphasis added), not solely his religion; *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1981) (stating that to make a valid claim under § 1981, the plaintiff must prove that he was "subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely . . . his religion"); *Ahmed v. Mid-Columbia Med. Ctr.*, 673 F. Supp. 2d 1194, 1204 (D. Or. 2009) (allegations that defendant made disrespectful remarks about the plaintiff's religious practices did not show the racial animus necessary to state a § 1981 claim).

In response to Fowler's motion to dismiss the § 1981 claim, Plaintiff submits a declaration in which he adopts as true the allegations in the unverified Complaint. Resp., Ex. A, Declaration of Surjit Singh Saund, ¶ 1 ("Saund Dec."). In his Response, however, Plaintiff impermissibly argues new unpleaded "facts" and/or misstates the actual Complaint allegations in an effort to conflate the very

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Plaintiff received the Dismissal and Notice of Rights issued by the EEOC on February 16, 2010. Whether Plaintiff's Title VII claim is timely depends on resolution of this issue; therefore, Fowler withdraws it motion for partial summary judgment as to the Title VII claim, but reserves its right to reassert the timeliness defense, among others, after discovery.

[2] Plaintiff spends pages in the Response arguing that Sikh is a race. Resp. at 14-16. Fowler has not disputed that assertion for purposes of this motion to dismiss.

distinct legal classes of religion and race, hoping that if the distinction is blurred, the race claim will survive. For example, the actual Complaint ¶ 16 allegation Plaintiff adopts is as follows:

> 16. As a Sikh, Mr. Saund has a sincerely held *religious belief* – required by his *faith* – that he may not cut his hair, including his facial hair, and must wear a turban on his head into which his hair is tucked and almost completely concealed. The requirements – to maintain unshorn hair and wear a turban – are central requirements of the Sikh *religion*.

Compl. ¶ 16 (emphases added).

In his Response, however, Plaintiff cites Complaint ¶ 16 as support for the following allegedly "Undisputed Fact":

> 5. A central requirement of religious Sikhism is that a Sikh may not cut his hair (including facial hair), and must keep his hair tucked and almost completely concealed inside a turban – in fact, the wearing of the turban is central to the Sikh *identity*, and is [sic] has the effect of publicly identifying and differentiating a Sikh from other *ethnic groups*. (Compl. ¶ 16; Saund Decl. ¶ 1).

Resp. at 3 (emphases added).

Thus, the Complaint allegation which addresses solely the Plaintiff's *religious* practices and says nothing about race or ethnicity is now subtly but materially altered in the brief and offered to the Court as an allegation supporting a race claim. This is not the only instance where Plaintiff recasts the actual Complaint allegations in an effort to resuscitate the race claim. Specifically, Plaintiff now states in the Response that when he visited Fowler's Durham office, Mr. Hanson "took one look at Mr. Saund's physical appearance, immediately identified him as a Sikh, and rejected him out of hand." *Id.* at 16. This is not alleged in the Complaint. Plaintiff also now states that "Mr. Hanson stated outright that he would not discuss employment with Mr. Saund *because Mr. Saund embodied all the outward characteristics of his race.*" *Id.* (emphasis added). This new allegation puts words in Mr. Hanson's mouth that cannot be found in the Complaint. Similarly, Plaintiff now alleges that "Mr. Hanson *admitted that he understood the ramifications of his actions, and that his position was based entirely upon superficial characteristics that Mr. Saund could not change without denying his racial identity.*" *Id.* (emphasis added). This allegation appears nowhere in the Complaint. This Court should disregard Plaintiff's new factual allegations concerning what Mr. Hanson said and unfounded suppositions about what Mr. Hanson meant.

Plaintiff is not entitled to plead new facts in the Response or to twist and mischaracterize facts previously alleged in the Complaint.

The Complaint allegations as they are stated in the Complaint, not as they are restated in the Response, are controlling. Close examination of the Complaint allegations shows that Plaintiff has not and cannot state a claim for intentional race discrimination. Plaintiff's argument to the contrary appears in the Response at pp. 16-18. There, Plaintiff points the Court to five paragraphs in the Complaint as sufficiently stating a race discrimination claim. None of these allegations separately or collectively are sufficient to state a claim for intentional race discrimination. The paragraphs Plaintiff relies on are as follows:

> 27. In response to Mr. Hanson's statement [that he would not speak with Plaintiff unless he removed his turban, cut his hair and shaved his beard], Mr. Saund explained to Mr. Hanson that he wore a turban because of his Sikh religion and that because of his faith, he could not remove his turban, shave his beard or cut his hair. Mr. Hanson told Mr. Saund that he was familiar with the Sikh religion, but that there was a company policy prohibiting hats and that Mr. Saund could not wear a turban. Mr. Hanson also asked Mr. Saund to return with short hair and a shaved beard.
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> 33. Upon meeting Mr. Saund, Mr. Hanson informed him that Fowler had a dress policy and that Mr. Saund could not wear a turban, long hair or a beard as a store operator. Mr. Hanson repeatedly promised Mr. Saund that if he removed his turban, cut his hair, shaved his beard and "looked good" and "looked smart," then Mr. Hanson would give Mr. Saund a gas station to operate.
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> 34. In fact, at all relevant times, Fowler's dress policy did not include any provision regarding hair length or facial hair.
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> 35. In fact, at all relevant times, Fowler did not prohibit its male non-Sikh store operators and other male non-Sikh store employees from having long hair or facial hair, and multiple Family Fare male non-Sikh personnel have long hair and facial hair.
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> 37. During the meeting, Mr. Hanson showed Mr. Saund and his daughter pictures of several award-winning Family Fare employees, including two apparently non-Sikh Indians, emphasizing their uncovered heads and shaved faces. While doing so, Mr. Hanson repeatedly made comments and gestures that were insulting and demeaning to Mr. Saund and his practice of wearing a turban.

These allegations do not come close to stating a claim for intentional race discrimination. First, race cannot be defined based on religious beliefs and practices alone. Wearing a turban and never cutting one's hair are *religious* practices – not racial practices. If a Sikh man decides not to wear a turban and to cut his hair he is still an ethnic Sikh, albeit one who does not practice the Sikh religion. A person cannot change his or her race. An Arab cannot become an Asian. An African cannot become a Latino. Nevertheless, a person may change his or her religious beliefs and practices but yet retain his or her race. For example, the Jewish race cannot be defined solely based on religious belief and practice—a Jew who does not keep kosher does not thereby become a Gentile. According to Plaintiff, Mr. Hanson told him that if he gave up his religious practices, he could have a store. Thus, Plaintiff's allegations establish that his race was not the issue – his religious practices were.

Second, even if the turban and unshorn hair are symbols of the Sikh race, and Fowler's dress policy adversely impacts Sikhs, Plaintiff's claim fails. Section 1981 does not apply to conduct that has a discriminatory *impact* against a group of people – it only applies when the conduct is motivated by a specific intent to discriminate on the basis of a particular race. *Gen. Bldg. Contractors Ass'n. v. Pennsylvania*, 458 U.S. 375, 387, 391 (1982) (holding that § 1981 requires that plaintiffs demonstrate intentional racial discrimination); *Runyon*, 427 U.S. at 167 (stating that § 1981 does not concern religious discrimination). Hanson's alleged willingness to give Plaintiff a store if he took off the turban and cut his hair precludes any finding of intentional race-based discrimination.[3]

Third, Plaintiff's allegation that male non-Sikhs were permitted to have "long hair and facial hair" does not cure the problem. As Plaintiff concedes, he must allege facts showing that he was treated differently than "similarly situated" non-Sikhs. *See* Resp. at 17 and cases cited therein. He has not done so. Since birth, Plaintiff has *never* cut his hair. Compl. ¶ 17. Plaintiff alleges that other male non-Sikh individuals have been permitted to have "long hair and facial hair." Compl. ¶ 35. However, having hair and a beard that has *never been cut* is not the same as or remotely similar to simply having long hair and facial hair. Plaintiff has not alleged the existence of any store operator or employee of a store operator who has never cut his or her hair since birth. Plaintiff, therefore, has not alleged facts sufficient to show that he has been treated differently than *similarly situated* non-Sikhs.

[3] Having made these fatal admissions to the Court, Plaintiff should be estopped from withdrawing or contradicting them through a subsequent amendment to his Complaint. Plaintiff has affirmed that the allegations in the Complaint are true based on his own personal knowledge. Saund Dec. ¶ 1.

Finally, the allegation that Hanson made comments and gestures that were insulting and demeaning to Plaintiff and his practice of wearing a turban does not support a race discrimination claim. Plaintiff's failure to allege any facts showing what comments and gestures were made precludes any evaluation of whether the comments and gestures were racially related or not. Most significantly, however, Plaintiff himself relates the unidentified comments and gestures to his *religious* practice of wearing a turban – again establishing that this case is, at most, about religious practices, not race.[4]

Cases Plaintiff cites throughout his Response actually highlight the failings of his Complaint in this case. For example, in *Bains LLC v. Arco Products Co.*, 405 F.3d 764 (9th Cir. 2005), the racial discrimination against the plaintiff's Sikh employees consisted of ethnic slurs, delayed service, and false accusations that they had committed safety violations. *Id.* at 767-68. There was no religious accommodation issue. Likewise, the racial discrimination in *Singh v. State Farm Mutual Automobile Insurance Co.*, 860 P.2d 1193 (Alaska 1993), involved allegations of repeated racial and ethnic slurs, but did not concern religious accommodation. *Id.* at 1196. Other cases the Plaintiff cites also turn on the presence of racial slurs and other evidence that the alleged discriminatory conduct was based on the plaintiff's race. *See, e.g., Adakai v. Front Row Seat, Inc.*, No. 96-2249, 1997 WL 603458, at *3 (10th Cir. Oct. 1, 1997) (Ex. A) (affirming a jury verdict finding intentional racial discrimination under Title VII where the defendants allegedly uttered numerous racial slurs concerning the plaintiff, including calling him a "scuzzy Navajo" and a "goddamned Indian"). Here, by contrast, Plaintiff's allegations uniformly concern religious practices and Plaintiff's request for accommodation and conclusively demonstrate that the alleged discrimination relates to Plaintiff's religious practices, not his race.

In sum, Fowler's facially neutral dress policy applies equally to all store operators regardless of race or religion. It bars store operators of any ethnicity from wearing any sort of headwear, including

[4] Plaintiff himself did not believe that race discrimination had occurred. In his Charge of Discrimination, he states that he "was denied the position because of my religious belief, Sikh" and that he believes he was "discriminated against because of my religion, Sikh." *See* Declaration of Richard M. Hutson, II, Exhibit A (attached to Fowler's Motion to Dismiss and for Partial Summary Judgment). Likewise, Plaintiff checked "Religion" as the *sole* basis for the alleged discrimination. *Id.*

baseball caps, cowboy hats, bowlers, berets, fedoras, turbans, top hats, and ushankas. Plaintiff asked Fowler to make an exception to this policy based on his religious beliefs. Fowler's refusal to grant that exception raises, at most, an issue concerning reasonable accommodation of religious practices under Title VII,[5] but it does not support a claim for intentional racial discrimination under § 1981. Consequently, Plaintiff's § 1981 claim should be dismissed with prejudice.

II. PLAINTIFF'S STATE LAW CLAIMS SHOULD BE DISMISSED WITH PREJUDICE BECAUSE THEY HAVE NO BASIS IN NORTH CAROLINA LAW.

Under Fourth Circuit precedent a federal court must rule based on existing state law and may not expand state law. Plaintiff's state law claims have never been recognized by North Carolina's state courts. Accordingly, Plaintiff's state law claims should be dismissed with prejudice.

Plaintiff asks this court to create a new common law tort for "wrongful failure to hire/contract" under North Carolina law. Plaintiff argues that "controlling precedent" requires recognizing this new common law tort, Resp. at 25, but has not cited any such controlling precedent. Indeed, Plaintiff has not cited a single decision by any North Carolina state court recognizing this new tort or any other common law tort recognized to enforce public policy (outside of the wrongful discharge context). [6]

Moreover, plaintiff has not cited a single decision by *any state court in the United States* recognizing this new tort. Plaintiff misleadingly states that "only a handful of state courts have even considered the issue, and *one of those courts would recognize the claim*." Resp. at 27 (emphasis added). The case cited for this proposition is a decision not by a state court (as represented by Plaintiff), but by the United States District Court for the Western District of Pennsylvania predicting what the state court might do if presented with the issue. The fact remains that no state court has recognized a claim for wrongful failure to hire in violation of public policy. In any event, Plaintiff's reliance on that court's decision in *Hamovitz v. Santa Barbara Applied Research, Inc.*, No. 2:07-cv-0454, 2010 WL 4117270 (W.D. Pa. Oct. 19, 2010) (Ex. B), is misplaced. In *Hamovitz*, the court concluded that the Pennsylvania

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[5] Although not relevant for purposes of this motion, Fowler disputes that it was an "employer" under Title VII.

[6] Plaintiff cites *Greenlee v. Southern Railway Co.*, 122 N.C. 977, 30 S.E. 115 (1898), as a case recognizing a common law tort, but *Greenlee* is simply a negligence case in which the court cited federal law as evidence of the proper standard of care.

Supreme Court would recognize a common law tort for refusal to hire "under the unique facts and circumstances of this particular case." *Id.* at *6. The "unique facts" in *Hamovitz* involved a plaintiff who worked for a military services contractor that provided base operations services for an Air Reserve Station in Pittsburgh. When that contract expired, a successor contractor refused to hire or reinstate the plaintiff, who was serving active duty in Pakistan during the changeover from the prior contractor, even though it hired "[v]irtually every other . . . supervisory employee" employed by the previous contractor. *Hamovitz v. Santa Barbara Applied Research, Inc.*, No. 07-454, 2010 WL 1337713, at *1-4 (W.D. Pa. Feb. 26, 2010) (Ex. C), *report and recommendation adopted by Hamovitz v. Santa Barbara Applied Research, Inc.*, No. 07-454, 2010 WL 1337742 (W.D. Pa. Mar. 31, 2010) (Ex. D). Thus *Hamovitz* essentially involved an ongoing employment situation, which differs significantly from Plaintiff's claim.

Federal courts must "rule upon state law as it presently exists," not "surmise or suggest its expansion." *Washington v. Union Carbide Corp.*, 870 F.2d 957, 962 (4th Cir. 1989) (Wilkinson, J., joined by Boyle, J., sitting by designation); *see also Burris Chem., Inc. v. USX Corp.*, 10 F.3d 243, 247 (4th Cir. 1993) ("[F]ederal courts sitting in diversity rule upon state law as it exists and do not surmise or suggest its expansion."). A federal court should not recognize new state law claims that have not been recognized by the state's own courts: "[W]e reaffirm our decision in *Washington*, and hold that a state claim which has not been recognized by that jurisdiction's own courts constitutes a settled question of law, which will not be disturbed by this court absent the most compelling of circumstances." *Tritle v. Crown Airways, Inc.*, 928 F.2d 81, 84 (4th Cir. 1991) (affirming district court's decision refusing to expand the common law tort claim for retaliatory discharge under West Virginia law) (emphasis added); *see also Jenkins v. Akzo Noble Coatings, Inc.*, 35 Fed. Appx. 79, 85 (4th Cir. 2002) (affirming the district court's decision refusing "to craft a wholly novel exception to the employment at will doctrine" because no North Carolina Supreme Court case had suggested that exception); *English v. Gen. Elec. Co.*, 765 F. Supp. 293, 296 (E.D.N.C. 1991) ("Given this court's finding that the North Carolina courts have not recognized a claim for bad faith discharge, allowance of that claim here would amount to an unwarranted expansion of state law.").

The Fourth Circuit has rejected the idea that "every cause of action in tort, no matter how speculative, presents an unsettled question on the frontier of state law which must be presented to state courts for resolution." *Washington,* 870 F.2d at 962. On the contrary, federal courts have discretion to dismiss state law claims with prejudice. *Id.* (affirming district court's decision granting summary judgment on a retaliatory discharge claim that had not been recognized under West Virginia law). Moreover, when "the district court finds no viable state cause of action . . . judicial economy also counsels in favor of a dismissal of the state claim with prejudice." *Id.*

Here, Plaintiff has not identified any basis in North Carolina law for his proposed new common law tort claim. Thus, it is settled law that North Carolina does not recognize such claims and they should be dismissed with prejudice.

This the 27th day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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This the 27th day of January, 2011.

/s/ Kerry A. Shad